



August 7, 2001

Mr. Mark Anthony Sánchez
Gale, Wilson & Sánchez, P.L.L.C.
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2001-3437

Dear Mr. Sánchez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150419.

The Alamo Community College District (the "district"), which you represent, received a request for information relating to a former employee, including his personnel file and any documents pertaining to disciplinary matters, performance complaints, investigation notes, correspondence, and reports, as well as any communications to and from a specified individual. The requestor also asked for the district's complaint procedures for sexual harassment complaints. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you have provided a letter from an attorney who represents a district employee that alleges damages in connection with the district's handling of a sexual harassment investigation. You contend that this letter proves the existence of reasonably anticipated litigation. The district, however, received this letter on May 31, 2001 and received the request for information on May 22, 2001. Because litigation must be reasonably anticipated on the date the governmental body receives the request for information, we conclude that you have failed to demonstrate that the district reasonably anticipated litigation on May 22, 2001. *See* Gov't Code § 552.103(c). Further, we conclude that the other submitted letters merely reflect that attorneys were hired and do not demonstrate that litigation was reasonably anticipated. Therefore, we conclude that the submitted information may not be withheld under section 552.103 of the Government Code.

We note, however, that a portion of the submitted information pertains to two sexual harassment investigations. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy

protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.*

The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In conclusion, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim.

The submitted information contains some documents that we consider to be analogous to the summary released in *Ellen* as well as correspondence dealing with the sexual harassment complaint procedures and the accused person's interview. You must release these documents, but redact the identities of the victims and any witnesses to the alleged sexual harassment which we have marked under section 552.101 in conjunction with common law privacy. In accordance with the holding in *Ellen*, you must also withhold the witness statements and interview notes, which we have marked, under section 552.101 in conjunction with common law privacy.

You also claim that the employment records are excepted under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

In this instance, release of some of the submitted personal financial information would implicate the privacy interest of the former employee. Section 552.023 of the Government Code, however, grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that

are protected from public disclosure by laws intended to protect that person's privacy interests. In this instance, the requestor is the attorney of the former employee whose privacy is being protected. Thus, the requestor is the former employee's authorized representative and, therefore, has a special right of access to the information protected under sections 552.101 and 552.102 in conjunction with common law privacy.

Further, the submitted information contains the former employee's home address, home telephone number, social security number, and family member information which is excepted under section 552.117(1) of the Government Code if the employee made a timely section 552.024 election. Because section 552.117(1) protects an employee's privacy, the requestor also has a section 552.023 right of access to this information.

We note, however, that the submitted information contains a medical record that is subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 552.101 also encompasses information protected by statute. Section 159.002(b) of the Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2.¹ We have marked the information that falls within the protection of chapter 159 of the Occupations Code and may be released only in accordance with the MPA's access provisions.

In conclusion, you must withhold, under section 552.101 in conjunction with common law privacy, the marked documents in their entirety, as well as the identities of alleged sexual harassment victims and witnesses in documents that must be released. We have also marked a medical record which may only be released in accordance with the MPA. As you have not demonstrated the applicability of section 552.103 and because the requestor has a special right of access to information excepted under common law privacy and section 552.117, you must release the remaining submitted information to the requestor. However, if the district receives a request for the same information from someone other than the former employee or his authorized representative, the district must request another ruling from this office.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

¹The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

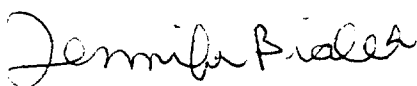
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 150419

Enc: Marked documents

c: Mr. Robert A. Schulman
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(w/o enclosures)